Office - Supreme Court, U.S.
FILED
MAY 9 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-6075

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1982

NORMAN S. SCHLANG,

Petitioner - Appellant

V.

JACK HEARD,

Respondent - Appellee

On Appeal from the United States
Court of Appeals for the Fifth Circuit

APPELLEE'S MOTION TO DISMISS

SUSAN SPRUCE
General Counsel
Office of the District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002

(713) 221-5816
Attorney for Appellee
Jack Heard

NO. 82-6075

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NORMAN S. SCHLANG,

Petitioner - Appellant

V.

JACK HEARD,

Respondent - Appellee

APPELLEE'S MOTION TO DISMISS

Appellee, Jack Heard, Sheriff of Harris County, Texas, respectfully requests the Court to dismiss the appeal herein and deny further review of Appellant's claims.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW APPELLANT'S CLAIMS AS AN APPEAL

This is an attempted appeal from a decision of the United States Court of Appeals for the 5th Circuit (691 F.2d 796), affirming an order of the United States District Court for the Southern District of Texas dismissing appellant's application for writ of habeas corpus. Appellant challenges the validity of his Texas misdemeanor conviction for promotion of prostitution alleging (a) a violation of his constitutional protection against double jeopardy, (b) denial of appointed counsel and a free transcript on appeal, (c) denial of the opportunity to prove that the State's principal witness committed perjury and (d) unconstitutional incarceration for failure to pay court costs.

This court's appellate jurisdiction does not extend to a case of this nature; the decision of the Fifth Circuit is reviewable, if at all, only by writ of certiorari 28 U.S.C. § 1254. Therefore, the appeal should be dismissed.

TREATING THE APPEAL AS A PETITION FOR A WRIT OF CERTIORARI, CERTIORARI SHOULD BE DENIED

Petitioner complains primarily that he was denied due process by the District Court's action in dismissing his petition without ordering an evidentiary hearing. He asserts that his petition for relief raised disputed material facts which required a hearing and precluded summary judgment for Respondent.

There is no assertion by Petitioner of any conflict between the decision of the Fifth Circuit and that rendered by this Court or any other federal or state tribunal. Rather, Petitioner simply asks this Court to review the findings of the lower courts.

In their opinion reviewing the dismissal order of the district court, the Fifth Circuit carefully reviewed each of Petitioner's alleged grounds for challenge to the validity of his confinement. The first claim alleging jeopardy was clearly controlled by established law indicating jeopardy never attaches when the trial court has no jurisdiction. Grafton v. United States, 206 U.S. 333; 27 S.Ct. 749 (1907). His second complaint involving improper denial of indigency status on appeal was unsupported by specific factual allegations and refuted by the transcript of the hearing on same in state court. Finally the Fifth Circuit concluded that Petitioner failed to allege facts in his third and fourth grounds which, if true, would demonstrate cause for relief. Under these circumstances, summary judgment was clearly proper and there is no need for further review by this court.

Respectfully submitted,

SUSAN SPRUCE
General Counsel
Harris County District Attorney's Office
201 Fannin, Suite 200
Houston, Texas 77002
(713) 221-5816

Attorney for Appellee
Jack Heard

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing instrument has been served upon the opposing party by placing it in the United States Mail, certified (return receipt requested), with sufficient postage affixed thereto, addressed as follows:

Norman S. Schlang
419 South Main Street, #6
Pasadena, Texas 77506

Done this 6th day of May, 1983.

Susan Spruce

SUSAN SPRUCE
General Counsel
Office of the District Attorney
Harris County, Texas